Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for Rulemaking and Declaratory Ruling	)	CG Docket No. 02-278
Regarding Prior Express Consent Under the	)	
Telephone Consumer Protection Act of 1991	)	

COMMENTS OF THE STUDENT LOAN SERVICING ALLIANCE (SLSA)
AND THE SLSA PRIVATE LOAN COMMITTEE (SLSA PLC)

The Student Loan Servicing Alliance (SLSA) and the SLSA Private Loan Committee (SLSA PLC) oppose the Petition for Rulemaking and Declaratory Ruling filed by Petitioners Craig Moskowitz and Craig Cunningham in the above-referenced docket. The Petition asks the FCC to overturn its allegedly "improper interpretation that 'prior express consent' includes implied consent resulting from a party's providing a telephone number to the caller."[1] Petitioners urge the FCC to instead define "prior express consist" under the Telephone Consumer Protection Act (TCPA) to mean consent that is expressly stated, in writing, specifically to allow autodialed or prerecorded calls at a specified telephone number.[2] As explained below, Petitioners' scheme would make obtaining consent for non-marketing calls unnecessarily burdensome and encourage even more abusive TCPA litigation.

SLSA is a non-profit trade association made up of over 20 major student loan servicers whose members service approximately $1 trillion in federally-owned and guaranteed student loans. In addition, SLSA members service approximately $100 billion in private education loans. SLSA PLC is a committee made up of over 55 involved in financing, lending, servicing, and

[1] Petition of Craig Moskowitz and Craig Cunningham for Rulemaking and Declaratory Ruling, CG Docket Nos. 02-278, 05-338 (filed Jan. 22, 2017) ("Petition"), at 2.
[2] *Id*. at 40, 48-49.

collecting private education loans. As discussed more fully below, SLSA and SLSA PLC members make calls to our customers in connection with the servicing of loans; these calls may be informational in nature, servicing-related, or collection-related. Our members do not make telemarketing calls as part of their duties as student loan servicers.

The TCPA was enacted to curb telemarketing abuses. The legislative history in both the House and Senate, as well as the bill itself, make it very clear that the purpose of the TCPA was to prevent telemarketers from using autodialers that generated random numbers, and tied up lines with long voice messages. For example, the Senate Committee Report provides: "The use of automated equipment to engage in telemarketing is generating an increasing number of consumer complaints. The Federal Communications Commission (FCC) received over 2,300 complaints about telemarketing calls over the past year. The Federal Trade Commission (FTC), State regulatory agencies, local telephone companies, and congressional offices also have received substantial numbers of complaints."[3]

And the final bill agreed to by the House and Senate included a lengthy set of Congressional findings entirely related to telemarketing. These provide in applicable part:

"The Congress finds that:
(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.
(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.
(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.
(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.
(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.
(6) Many consumers are outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers.
(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control

[3] S. Rep. No. 102-178, at 1969 (1991).

residential telemarketing practices.
(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.
(9) Individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.
(10) Evidence compiled by the Congress indicates that residential telephone subscribers consider automated or prerecorded telephone calls, regardless of the content or the initiator of the message, to be a nuisance and an invasion of privacy.
(11) Technologies that might allow consumers to avoid receiving such calls are not universally available, are costly, are unlikely to be enforced, or place an inordinate burden on the consumer.
(12) Banning such automated or prerecorded telephone calls to the home, except when the receiving party consents to receiving the call or when such calls are necessary in an emergency situation affecting the health and safety of the consumer, is the only effective means of protecting telephone consumers from this nuisance and privacy invasion.
(13) While the evidence presented to the Congress indicates that automated or prerecorded calls are a nuisance and an invasion of privacy, regardless of the type of call, the Federal Communications Commission should have the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution."[4]

The Congressional findings explicitly provide that the FCC should have the flexibility to create different rules for different types of automated or prerecorded calls, including noncommercial (i.e., non-telemarketing) calls. And over the past 25 years, the FCC has consistently done just that.

The FCC should dismiss the Petition as an untimely Petition for Reconsideration.

Petitioners seek to apply and expand the current TCPA requirements for "prior express written consent" applicable to telemarketing calls to calls made for non-telemarketing, informational purposes (including debt collection). The FCC already considered this question in a prior rulemaking and rejected Petitioners' position.[5] In 2010, the FCC sought comment on a proposal to harmonize its TCPA rules with the FTC's Telemarketing Sales Rule.[6] The FCC's proposal

[4] P. L. 102-243, 105 Stat. 2394 (December 20, 1991).
[5] Final Rule, CG Docket No. 02–278; FCC 12–21; published in Federal Register, Vol. 77, at p. 34233 (June 11, 2012) ("Final Rule").
[6] Proposed Rule, CG Docket No. 02-278; FCC 12-21; published in Federal Register, Vol. 75, at page 13471 (March 22, 2010) ("Proposed Rule").

would have required prior express written consent for all calls to wireless devices using an autodialer or pre-recorded voice. In other words, the proposal would have required prior express written consent for both telemarketing and non-telemarketing calls, similar to the relief sought in the Petition. Numerous commentators weighed in on the proposal.

After a lengthy period of consideration, the FCC decided not to require prior express written consent requirement for non-telemarketing calls. As the FCC explained:

> While a few commenters argue that the Commission should require written consent for *all* autodialed or prerecorded calls (*i.e.*, not simply those delivering marketing messages), it concludes that requiring prior express written consent for all such calls would unnecessarily restrict consumer access to information communicated through purely informational calls. For instance, bank account balance, credit card fraud alert, package delivery, and school closing information are types of information calls that the Commission do not want to unnecessarily impede.[7]

The FCC carefully examined the language of the TCPA, the statute's legislative history, Congressional intent, and the proceeding record when it decided to modify its initial proposal. Petitioners neither present evidence of changed circumstances nor explain why they did not participate in the original proceeding. Accordingly, the FCC should treat the Petition as an untimely Petition for Reconsideration and dismiss it.

If the FCC considers the Petition, it should deny Petitioners' requests based on longstanding guidance. The current prior express consent framework has been in place for more than 25 years, and constitutes a reasonable balancing of the interests Congress sought to protect when it enacted the TCPA. The FCC has consistently followed Congressional intent in drawing distinctions between telemarketing and non-telemarketing calls, and in its interpretation that, in a normal business transaction, providing a telephone number for contact purposes constitutes prior

[7] Final Rule at 34236.

express consent. For example, in an early Declaratory Ruling, the FCC took its Congressional charge seriously and explained that the TCPA was not meant to interfere with non-telemarketing calls from a business to its customers:

> Additionally, the legislative history indicates that the TCPA does not intend to unduly interfere with ongoing business relationships; barring autodialer solicitations or requiring actual consent to prerecorded message calls where such relationships exist could significantly impede communications between business and their customers.[8]

In 1995, the FCC again specifically exempted from the rules regarding prerecorded messages those calls a business makes to its existing customers and calls that are non-telemarketing.[9]

In its 2008 TCPA Order, the Commission explained that "the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt"[10] and further noted that the legislative history in the TCPA supports such an interpretation, citing the House report on what ultimately became the TCPA: "The restriction on calls to emergency lines, pagers, and the like does not apply when the called party has provided the telephone number of such a line to the caller for use in normal business communications."[11] The Commission also recognized in its 2008 TCPA Order that "calls solely for the purpose of debt collection are not telephone solicitations and do not constitute telemarketing."[12]

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[8] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 7 FCC Rcd. 8752, 8770, ¶ 34 (Oct. 16, 1992) ("FCC 92-443").
[9] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd. 12391, 12400, ¶ 17 (Aug. 7, 1995) ("FCC 95-310").
[10] *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Request of ACA International for Clarification and Declaratory Ruling, Declaratory Ruling* FCC 07-232, at 564 ¶ 9 ("2008 TCPA Order").
[11] *Id.* (citing H.R. Rep. No. 102-317, at 17 (1991)).
[12] *Id.*

And, as discussed above, the FCC considered this precise issue in 2012 when deciding not to require written consent for the non-telemarketing, informational calls that Petitioners now target.

Granting the Petition would cause widespread confusion and would be unfair to consumers and businesses. Callers, the courts and the FCC have worked under the current prior express consent standard for the past 25 years, and are accustomed to the existing framework. Businesses that make non-telemarketing calls have relied on the FCC's rulings under the TCPA, as well as court decisions interpreting those rulings, in obtaining prior express consent. For example, SLSA and SLSA PLC members take steps to make sure that our customers understand that they are providing a telephone number so that we may call them at that number and they are giving permission for us to call them regarding their student loan debt

As borrowers' primary point of contact about their student loans, servicers are critical to helping borrowers understand and take advantage of their repayment options, a key to successful loan repayment. This is particularly true given the limited financial experience and education many student loan borrowers have. Student loan servicers are responsible for a range of services related to the collection of student loans, including the processing of applications for the various repayment plans, inbound and outbound communications with borrowers, the provision of disclosures and billings, and the collection and processing of payments.

Almost all of our outbound telephone outreach to borrowers is in connection with attempting to collect payments, including helping borrowers choose the best repayment plan in order to be able to afford their payments, or a temporary cessation in payments, thereby avoiding the consequences of delinquency and default. Such escalated telephone outreach is generally not necessary to borrowers who are consistently making on-time loan payments in a standard

repayment plan; we can correspond with them through messages on their billing statements, etc. But where our written messages convey the need for required action by the consumer, if the consumer does not read the notice or respond timely, then we must find a way to escalate the contact. And given that there are over 40 million student loan borrowers, we must be able to take advantage of technology and automated processes to reach out to as many of these borrowers as possible.

The TCPA was enacted at a time when mobile phones were rare and consumers were assessed charges for specific calls or time spent using the phone. This is no longer the case, as many plans offer flat rate or unlimited calling and texting plans. Cell phones are an indispensable part of modern life, particularly with the student loan borrower population. According to a recent U.S. Department of Health and Human Services study, almost half (49.3%) of all American households had only wireless telephones during the first half of 2016, an increase of almost 2 percent over 2015. This number is even higher for those age brackets more likely to have student loans — almost three-quarters of adults aged 25-29 (72.1%) and 69.8% of those aged 30-34 live in households with only wireless telephones.[13]

Given the growing majority of student loan borrowers who have migrated away from traditional landline telephones in favor of cell phones, or who have only ever had a cell phone, the inability to call or text a student loan borrower's cell phone increasingly translates into the inability to reach the borrower at all. This can have devastating consequences on borrowers' credit and on their future in terms of our inability to help them avoid delinquency and default.

[13] Stephen J. Blumberg, Ph.D., and Julian V. Luke, Division of Health Interview Statistics, National Center for Health Statistics, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, "Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, January–June 2016," available at https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201612.pdf

Granting the Petition would throw the current consent practices into confusion and disarray. Consents that have already been obtained could be invalidated if the Petition is granted, and the permissibility of past calls and/or calls that are subject to litigation could be thrown into doubt. It would also encourage additional litigation, including more of the abusive lawsuits that the TCPA has become known for. In addition, it will cause confusion and hardship for consumers, many of whom would be operating under the belief that they had signed up for beneficial informational texts and cell phone calls, but would no longer receive them. If a borrower is accustomed to receiving a phone call or text to remind them that their student loan payment is due, then suddenly stopping those contacts could cause the borrower to become delinquent on their loan.

The FCC's prior express written consent disclosures apply only to telemarketing calls. But Petitioners are urging that the disclosures be expanded and required to be used by non-telemarketing businesses: "By executing this agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory advertisements, telemarketing, debt collection, and any other type of calls and messages using an automated telephone dialing system or an artificial or prerecorded voice."[14] If a student loan servicer sent such a disclosure to a student loan borrower, it would be very misleading and off-putting to the borrower. Student loan servicers do not conduct telemarketing activities in connection with their servicing duties, and do not engage in debt collection. The language of the disclosure is wholly inappropriate for businesses other than telemarketers.

The Petitioners' proposal would also make it unnecessarily burdensome to obtain consent for non-telemarketing calls. It would create more and unnecessary paperwork for borrowers. If

[14] *See* Petition, App. A at 48.

the student loan has already been made, it is not clear how would a student loan servicer would go about obtaining consent under the new standard. Given that there are over 40 million student loan borrowers, this is not an insignificant problem.

Petitioners do not make a compelling argument under *Chevron*. Petitioners allege that the FCC's current interpretation of the TCPA does not meet the standard of review described in *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 487 US 837 (1984). They maintain that the FCC has somehow changed "express" to "implied" in terms of regulating prior express consent.

This argument is refuted by the text of the TCPA, its legislative history, and Congress's findings. Congress gave the FCC "the flexibility to design different rules for those types of automated or prerecorded calls that it finds are not considered a nuisance or invasion of privacy, or for noncommercial calls, consistent with the free speech protections embodied in the First Amendment of the Constitution."[15] Even if a court were to find the statute to be vague or ambiguous, the FCC's interpretation is based on a permissible construction because it requires callers to take a specific, affirmative step to demonstrate consent (e.g., providing a telephone number to the caller). The petitioners are simply incorrect when they assert that the FCC has adopted an "implied" consent requirement.

In fact, the Petitioners attempt to rewrite the statute in the very way for which they criticize the FCC. By attempting to add the word "written" to the prior express consent framework, Petitioners seek change the TCPA's requirements in ways Congress did not intend. A Senate Commerce Committee Report (which Petitioners quote incompletely and misleadingly) is instructive here. It provides:

[15] P. L. 102-243, 105 Stat. 2394 (December 20, 1991).

> Some telemarketers asked that S. 1462 be amended to exempt the following automated calls: automated calls made by companies to tell people who have ordered products that the item is ready for pickup; automated calls made for debt collection purposes; and automated calls that ask a customer to "Please hold. An operator will be with you shortly." These exemptions are not included in the bill, as reported. The Committee believes that such automated calls only should be permitted if the called party gives his or her consent to the use of these machines. In response to these concerns, however, the reported bill does not include the requirement included in the bill as introduced the requirement that any consent to receiving an automated call be in writing. The bill as reported thus will allow automated calls to be sent as long as the called party gives his or her prior express consent either orally or in writing.[16]

The Senate Committee explicitly rejected the notion of written consent, and the final legislation agreed to by the House and Senate did not include a requirement that the consent be in writing.

Conclusion. We urge the Commission to dismiss the Petition; in reality it is an untimely Petition for Reconsideration of the FCC's 1992, 2008, and 2012 decisions. Should the FCC decide to take up the Petition, we urge it to deny the relief sought by Petitioners. The FCC's prior express consent framework is well-settled, reasonably balances the competing interests that Congress sought to protect, and withstands scrutiny under *Chevron*. In contrast, the scheme advanced by Petitioners would make obtaining consent unnecessarily burdensome for callers and encourage even more abusive TCPA litigation against well-meaning callers who place non-marketing, informational calls.

[16] S. Rep. No. 102-178, at 1971 (1991).

SLSA and the SLSA PLC appreciate the opportunity to provide comments on the Petition.

Respectfully Submitted,

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